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Opinion following rehearing

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LATERRIAL DESMONES JONES, Defendant and Appellant.	C083764 (Super. Ct. No. 16FE011740)

A jury convicted defendant Laterrial Desmones Jones of battery and criminal threats against his wife. In bifurcated proceedings, the trial court found true allegations

that defendant had a prior strike conviction and a prior serious felony conviction. The trial court sentenced defendant to an aggregate term of seven years eight months in prison, consisting of the following: 32 months (the low-term doubled) for the criminal threats, plus five years for the prior conviction alleged on that count, and a concurrent term of six months for the battery.

In his appellant's opening brief, defendant argued there was insufficient evidence to support his conviction for criminal threats. After we issued an opinion affirming the judgment, defendant filed a petition for rehearing arguing that he is entitled to the benefit of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393), which went into effect on January 1, 2019. Senate Bill 1393 amends Penal Code sections 1385 and 667, subdivision (a),[1] granting trial courts discretion to dismiss or strike a prior serious felony conviction allegation. We granted the petition for rehearing, vacated our opinion, and considered the supplemental arguments made by the parties. The People agree that the matter should be remanded to allow the trial court to consider whether to exercise its new discretion.

We conclude defendant's claim of insufficient evidence lacks merit, and we will affirm the judgment of conviction. But we will remand the matter to allow the trial court to consider whether to exercise its discretion under sections 1385 and 667, subdivision (a) to strike or dismiss the prior serious felony conviction enhancement.

BACKGROUND

Defendant and the victim started dating when they were in high school. They married in 2007, and in June 2016 they were living together with their two children.

On June 8, 2016, defendant and the victim had a fight at their apartment. A neighbor called 911 to report the fighting and stated she heard a threat about a shooting.

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[1] Undesignated statutory references are to the Penal Code.

The victim called her sister Cortney and asked to be picked up. When Cortney arrived, the victim was really upset. Defendant and the victim were yelling and arguing, the victim's voice was gone, and she was crying. The victim went with the children to Cortney's car and Cortney called the police. Cortney also called another sister, Christie, to come get the children. When Christie arrived, the victim and her older child were crying. Christie left with the children.

Cortney and the victim waited in Cortney's car for law enforcement. At trial, Cortney testified defendant approached her car and she did not hear him make any threats. But in a 911 call she said defendant was screaming, acting crazy, and trying to pull the victim out of the car. She reported him saying that he was going to kill the victim and the children. She told the dispatcher they would meet law enforcement at a nearby Safeway.

When law enforcement arrived at the Safeway, Cortney told Officer Michelle Cranford that when she arrived at the apartment, defendant said, "I'm going to fuck you all up," "I'm going to kill you and I'll kick your ass." She added that while Cortney and the victim waited outside the apartment for law enforcement, defendant walked toward the car with a crazy look in his eyes and screamed that he was going to kill them.

Officer Cranford eventually spoke with the couple's son, who said he had seen defendant punch the victim in the face or stomach and throw her on the ground. When he told defendant to stop, defendant would hit him and sometimes pick him up by the throat. The son said, "My mom always gets bruises or bleeds when he punches her in the face or stomach. I tell him to stop. Then he hits me. He usually will punch me in my face or in my stomach." He reported both he and the victim were afraid of defendant. He also reported defendant had threatened to kill them all, saying he would shoot them or break their jaws if they tried to call for help.

Officer Liesl Marin interviewed the victim, who was sobbing. Officer Adeline Lustig photographed the victim's injuries. The victim reported defendant had slapped her

in the ear and punched her in the face. She said she got bruising from defendant hitting, punching, and kicking her. The victim reported defendant had been physical with her in the past, usually just pushing and shoving her. In the last week, when he started using methamphetamine, he got more violent.

The victim reported a prior incident in which defendant punched her in the mouth, hit and kicked her, slapped her in the ear, and choked her. When she tried to reach for her phone, he hit her on the right arm with a hammer. Officer Marin saw some of the bruises from that assault. The victim did not call the police that day because she was afraid. Defendant started sending the victim threatening text messages warning her not to say anything, and sent one saying, "You're going to die." The victim showed Officer Marin the text message. The victim also told Officer Marin that defendant had previously threatened that if she ever left him, he would kill her and the children. When defendant returned to the apartment, he said he was looking for a baseball bat in their son's room so he could kill her with it. He did not find the bat, but he hit and kicked the victim throughout the day.

On the morning of June 8, their son was sick and the victim took him to the emergency room. When she returned, defendant was in bed with another woman. They argued, resulting in the neighbor calling the police and the victim calling her sister.

The victim spoke with Officer Marin for at least two hours. She told the officer she wanted to press charges against defendant for the abuse. She said she was afraid to go back home because defendant had threatened to kill her and her children. She was also afraid to go with either of her sisters because defendant knew where they lived. She believed defendant was the kind of man that if she took him back, he would kill her. After the interviews were complete, law enforcement took the victim back to the apartment to help her get some of her belongings. But later that day the victim and defendant were back together.

On June 10, 2016, Child Protective Services (CPS) told the victim she should not spend time with defendant and should not have the children around him. Her children were removed from her custody and placed with Cortney, pending the completion of this case and their concerns about the victim spending time with defendant.

The victim subsequently told Detective Bihn Vu she wanted to change her story. She told Vu her sisters did not like her husband so they made things up about how she got her bruises. She denied that most of her injuries were from defendant and said the bruises were from a sex tape she and defendant had made with another girl over the weekend. She denied he had sent threatening text messages to her and said she had deleted the text messages. Detective Vu did not believe her denials, testifying that in his experience, it is common for a victim to change their support for the prosecution of an abuser.

The victim also spoke with Gina Martinez, a victim advocate at the District Attorney's office. The victim told Martinez she did not want to testify in the case and did not want defendant to go to jail. She would accept him going to parenting classes, anger management, and domestic violence classes. About one month later, in a July 15 phone call with Martinez, the victim said she was not going to testify and wanted to get her husband and children back home.

David Cropp testified as an expert in intimate partner battering and its effects.[2] He defined domestic violence generally as a "pattern of abuse or coercion designed to control an intimate partner." The abuse could be physical, emotional, psychological, sexual, financial coercion, or spiritual or religious. He said it is common to see

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[2] The People moved to admit Cropp's testimony as an expert witness. Defense counsel asked the trial court to defer the ruling until after the victim's testimony to determine whether an expert was needed. The trial court agreed to defer the ruling, indicating the defense could object when the People called Cropp. The trial court did not expressly rule on admissibility, but there was no objection to Cropp's testimony as an expert.

intimidation of a victim, as well as isolation from family and friends, and also common for victims to minimize the abuse and blame themselves. Cropp described the three-cycle phase typical in domestic violence: tension building, where the victim is anxious; an acute episode, the abuse itself; and a period of contrition, apologies, more excuses, and lack of tension. The third phase can follow an acute episode in a matter of hours. The nature of the relationships involved in domestic violence situations makes it particularly challenging for victims to testify against perpetrators. Up to 80 percent of domestic violence victims "recant, change their stories, or otherwise refuse to cooperate in the investigation, the prosecution of these cases." Cropp said it is common for victims to reconcile with perpetrators and renew their relationship. He said a victim's report is more likely accurate when they are reporting an acute episode.

The victim testified at trial that she lied about the June 8 fight. She denied there had been a physical altercation between her and defendant and claimed he did not threaten her. She said she lied to the police because she was mad at defendant about the other woman.

Defendant testified he and the other woman had been having an affair and the victim was angry about that. He denied threatening or hitting the victim.

The jury found defendant guilty of battery (§ 242) as a lesser included offense of domestic violence against the victim (§ 273.5, subd. (a) -- count 1), and of criminal threats against the victim (§ 422, subd. (a) -- count 4). The jury found defendant not guilty on the remaining counts. In bifurcated proceedings, the trial court found true allegations that defendant had a prior strike conviction (§§ 667, subd. (d), 1192.7, subd. (c)) and a prior serious felony conviction (§ 667, subd. (a)). The trial court sentenced defendant to an aggregate term of seven years eight months in prison, consisting of the following: 32 months (the low-term doubled) for the criminal threats, plus five years for the prior conviction alleged on that count, and a concurrent term of six months for the battery.

DISCUSSION

I

Defendant contends there is insufficient evidence to support his conviction for criminal threats. Specifically, he claims there is insufficient evidence of the element that the victim experienced sustained fear. He argues it is inherently improbable that she would have spent time with him later that day, and over the next week, if she were in fear.

Where the sufficiency of evidence is challenged on appeal, we review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) Substantial evidence is evidence that is "reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.) We draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Before the judgment can be set aside for insufficient evidence, "it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

To establish criminal threats under section 422, the prosecution must prove: (1) the defendant willfully threatened to commit a crime causing death or great bodily injury to the victim; (2) the threat was made with specific intent that it be taken as a threat -- even absent intent to carry out the threat; (3) the threat was, on its face and under the circumstances, " ' "so unequivocal, unconditional, immediate, and specific" ' " as to convey to the victim " ' "a gravity of purpose and an immediate prospect of execution of the threat" ' "; (4) the threat caused the victim to be in sustained fear for her safety; and (5) the fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630.) "Sustained fear" involves (1) the emotional reaction the victim has to the communication, and (2) the period of time during which the victim experiences that fear.

The word "sustained," as used in section 422, refers to " 'a period of time that extends beyond what is momentary, fleeting, or transitory.' " (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349 (*Fierro*).)

"Fifteen minutes of fear . . . is more than sufficient to constitute 'sustained' fear for purposes of . . . section 422." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; see *Fierro, supra*, 180 Cal.App.4th at pp. 1348-1349; *People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) In some circumstances, even one minute of fear can be sustained fear. (*Fierro,* at p. 1349.)

There is evidence the victim was afraid after defendant made his threats. She met law enforcement at a Safeway, she was afraid to go home, and she was afraid to go to her sisters' homes. Given the circumstances, law enforcement believed it was appropriate to escort the victim home so she could gather her belongings. Although the victim reunited with defendant later that afternoon, many hours had passed by that time. The record supports a finding of sustained fear following the threats.

Defendant argues inherent improbability, but " '[t]o warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' " (*People v. Barnes* (1986) 42 Cal.3d 284, 306, quoting *People v. Thornton* (1974) 11 Cal.3d 738, 754; accord *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 261.) Except in rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the factfinder's resolution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Testimony may be rejected as inherently improbable or incredible only when the testimony is unbelievable per se, physically impossible or

wholly unacceptable to reasonable minds. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

Defendant's claim that the victim "could not have possibly been in a state of sustained fear when she reunited with [defendant] the same afternoon of the alleged threat and then spent the next six days with [defendant]" is really a claim that the jury should have inferred or deduced from the circumstances of the victim's conduct after the fight at the apartment that she was not afraid of defendant, and that her initial statements to law enforcement were lies. On this record, however, we will not invade the province of the jury in making such factual determinations.

Defendant relies on a 1952 case, *People v. Carvalho* (1952) 112 Cal.App.2d 482, in arguing inherent improbability. But here there was expert evidence explaining the cycle of violence in intimate battering relationships, and that it is common for victims of domestic violence to quickly reconcile with their abusers and change their stories. Defendant's argument lacks merit.

II

Defendant filed a petition for rehearing claiming he should receive the benefit of recent amendments to sections 1385 and 667, subdivision (a). The trial court imposed a mandatory five-year term for the prior conviction pursuant to section 667, subdivision (a). But Senate Bill 1393 grants discretion to strike or dismiss the enhancement allegation or the punishment for the enhancement if doing so would be in the interest of justice. (§§ 667, subd. (a), 1385, subd. (b).)

Defendant and the People agree that Senate Bill 1393 applies retroactively to this case. "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.] We [base] this conclusion on the premise that ' "[a] legislative mitigation of the penalty for a particular crime represents a

legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." ' " (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted, italics omitted; see *In re Estrada* (1965) 63 Cal.2d 740, 745.) The rule of retroactivity articulated in *Estrada* applies where the Legislature amends a statute to give the trial court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) Because Senate Bill 1393 gives a trial court discretion to strike or dismiss a prior serious felony conviction enhancement allegation or finding, which discretion the trial courts did not previously have, and nothing in the statutes indicates the Legislature intended the amended statutes to be prospective only, we conclude the amended sections 1385 and 667, subdivision (a) apply retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961 [holding Senate Bill 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing based on a prior serious felony conviction when the conviction is not final before the statute's effective date of January 1, 2019]; *In re Estrada, supra,* 63 Cal.2d at p. 745; *Francis, supra,* 71 Cal.2d at pp. 75-76.)

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) The general rule is remand, and here the record does not clearly indicate that remand would be futile. Accordingly, we will not depart from the general rule.

We express no opinion as to how the trial court should exercise its newly granted discretion on remand. We only conclude that, under the circumstances of this case, the trial court should be given the opportunity to exercise its discretion in the first instance.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to consider whether to exercise its discretion under sections 1385 and 667, subdivision (a).

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
BUTZ, J.